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In the Supreme Court of the United States

October Term, 1991

BENJAMIN BARRY KRAMER

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER WHEN A SENTENCING COURT UTILIZES MULTIPLE DEPARTURES WHICH RESULT IN A GUIDELINE SENTENCE NEARLY FIVE TIMES GREATER THAN THE BASE OFFENSE LEVEL AS ADJUSTED FOR ACCEPTANCE OF RESPONSIBILITY, THIS COURT SHOULD EVALUATE BOTH THE REASONS FOR AND THE QUANTUM OF THE DEPARTURES WITH SPECIAL SCRUTINY IN ORDER TO ASCERTAIN WHETHER THE LEGAL REQUIREMENTS OF THE FEDERAL SENTENCING GUIDELINES AS WELL AS THEIR UNDERLYING PHILOSOPHY HAVE BEEN FOLLOWED?

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OPINION BELOW

A copy of the opinion entered by the United States Court of Appeals for the Eleventh Circuit as well as copy of the Order of that Court denying the Petitioner's request for rehearing and his suggestion for rehearing en banc is included in the Appendix.

BASIS FOR JURISDICTION

The judgment giving rise to this petition for writ of certiorari was rendered on October 11, 1991, and an order denying both the suggestion for en banc review and the petition for rehearing was entered on January 2, 1992. This Court granted the Petitioner an extension of time in which to file the instant petition up to and including April 30, 1992.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(l).

The Petitioner relies upon the United States Sentencing Guidelines and their Commentaries in this petition. Because of the length of these Guidelines they are not set out in their entirety in the Appendix but specific portions referred to are quoted in pertinent part in the text of this petition.

STATEMENT OF THE CASE

The Petitioner was indicted with four other individuals in United States District Court for the Southern District of Florida and entered his plea of guilty to three counts of a superseding indictment,

each count carrying a statutory maximum sentence of five years' incarceration, charging that Mr. Kramer: conspired to effect an escape from custody, attempted escape and attempted to obtain a prohibited object to aid his escape (the helicopter).

Benjamin Kramer was sentenced to consecutive sentences of sixty months on each of two counts and a further consecutive sentence of five months as to the third count for a total sentence of 125 months, a sentence nearly five times the median sentence for the applicable guideline range of thirteen, reduced by acceptance of responsibility.

The Eleventh Circuit Court of Appeals denied him relief in a published opinion on October 11, 1991. The petitioner filed a Petition for Rehearing and a Suggestion of Rehearing En Banc on November 14, 1991 which was denied on January 2, 1992.

Mr. Kramer, acting pro se, requested an extension of time in which to file the instant Petition and tendered the appropriate filing fee previous to the instant filing. This Court granted the requested extension up to and including April 30, 1992. Undersigned counsel enters a Notice of Appearance on behalf of Mr. Kramer by virtue of this filing.

STATEMENT OF FACTS

On April 17, 1990, a helicopter landed in the exercise yard of E Unit of the Metropolitan Correctional Center, Miami, Florida, and upon its attempted take-off crashed in an area outside that yard. The only individuals who were injured were Benjamin Kramer and a co-defendant.

The appropriate Base Offense Level set by the Sentencing Commission for escape is Level 13. Mr. Kramer was granted an reduction of two levels for acceptance of responsibility.

The Court imposed a four level upward adjustment for the Petitioner's role in the offense; departed two levels for more than minimal planning; one level for property damage and loss; three levels for disruption of government function; and four levels for endangerment of the public welfare. A stand-committed fine was imposed, without benefit of factual findings of ability to pay, in the amount of $100,000.

The above departures were taken in toto from the recommendations of the Pre Sentence Investigation Report.

ARGUMENT

The implementation of Sentencing Guidelines has been a change of such proportion in the manner in which individuals are charged, sentenced and serve their periods of incarceration or supervision that lower courts have been wrestling with multitudes of issues of first impression in this area.

This Court has dealt with many of the very broad outlines of guideline sentencing[1] and now it is respectfully urged that this court consider more limited yet tremendously important violations of the letter and of the spirit of the guidelines, specifically departures, the quantifications of such departures, and the burden of proof which must be utilized when the resulting sentence is an extreme departure from the guidelines.

The philosophy underpinning the sentencing guidelines is the ascertainment, with some degree of certainty, of the anticipated sentence of a charged defendant. This certainty serves several policy goals. Citizens know, with some specificity, the conse-

1. See, for instance Mistretta v. United States 488 U.S. 361 (1990), and Burns v. United States ___U.S. ___, 111 S.Ct. 2182 (1991).

quences of their acts of a criminal nature. The Government can compute with some accuracy the consequences of its charging decisions and is under an increased duty to treat those charging decisions with the utmost of care because of the consequences to the defendant, the court, and the authorities which either incarcerate or supervise individuals after sentencing. Here, the charging decision segmented the activity into multiple facets, thereby increasing the potential statutory maximum punishment.

Courts, though frequently chafing at the restrictions on their sentencing flexibility, are given the mandate to follow both the letter and the philosophy of the guidelines, in significant part to assure that there will be predictability and equity in sentencing[2].

Trial courts compute adjustments and departures which result in catastrophic differences from base offense levels on a daily basis and often without clearcut guidelines and procedures for the quantum of the adjustment. Yet changes of only one offense level can impact a sentence dramatically, e.g. from the bottom of level

2. In its Commentaries the Sentencing Commission, after recognizing the multitude of problems which may arise, concluded, "Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts." U.S.S.G. Ch. 1, Pt.A., intro comment.

10 to the top of level 11 can change the permissible, non-reversible sentence by more than one hundred percent from a minimum of six months' incarceration to a maximum of fourteen months' incarceration.

In the instant case the base offense level was thirteen and Mr. Kramer was credited with accepting responsibility, yet the ultimate utilized offense level was twenty-five, thus increasing the permissible sentence, for a similarly situated Level V defendant, who had accepted responsibility from a low of twenty-four months' incarceration to a maximum sentence of one hundred twenty-five months, the sentence actually imposed in the instant case.

In order to effectuate an increase of this magnitude, the sentencing court discarded the usual mandate to sentence concurrently on grouped offenses, and imposed the statutory maximum on two of the three offenses and an additional sentence of five months' incarceration on the third of three counts.

The Sentencing Commission intended that in the vast majority of cases all offenses be grouped, hence consecutive sentences would be a rarity: "Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total pun-

ishment as the sentence on that count." U.S.S.G Section 5G1.2, comment.

If any level of consecutive sentence is to be the rarity, imposing sentence on each of the three separate counts should rarely if ever be appropriate.

This court should view such departures with disfavor and should evaluate the factual findings in such extreme departures against a standard, at a minimum, of least clear and convincing evidence. Such close scrutiny of reviewing courts is mandated to review whether the trial court was justified in its imposition, that is that it was operating within the philosophical and legal boundaries of the sentencing guidelines. Sentences such as this--five times the median base offense level for one who has accepted responsibility--should be a clear signal that this is the special case in which a reviewing court must employ this special scrutiny.

In the instant case, as in perhaps the vast majority of sentencings, the trial court accepted the departures suggested by the Probation Officer in their entirety. It totally failed in its duty to weigh not only whether the departure was in fact justified at all but the concomitant duty to then, after its finding of departure, fairly evaluate the quantum of the departure, not only as proposed in each

category, but to also the effect of each level of departure in relationship to the base offense level. See, discussion of United States v. Kikumura, 918 F.2d 1084 (3rd Cir. 1990), (Kikumura I) and United States v. Kikumura, 947 F.2d 72 (3rd Cir. 1991) (Kikumura II) infra.

The errors of the trial court were only magnified by the Court of Appeals' rather cursory evaluation of the factual and logical underpinnings of the trial court's analysis. Rather than careful evaluation with citation to relevant authority, the panel rather accepted the somewhat colorful rendition of the factual scenario and summarized these facts as the justification for the departure by the sentencing court of five hundred percent from the carefully crafted, appropriate guideline sentence level.

Mr. Kramer wishes to address himself to the most obvious overreaching by the trial court.

A. THE STANDARD OF REVIEW

This Court, in its efforts to consistently construe lower courts' attempts at arriving at appropriate guideline sentences, must recognize that sentences which are multiples of those appropriate under the base offense levels as promulgated by the Sentencing

Commission should be viewed with particular care. If the goal of uniform, consistent sentencing is to be achieved, sentencing courts must be required to adhere strictly to the mandates of the guidelines and must take as their direction the base offense level as promulgated. When departures or adjustments result in a sentence well in excess of that found appropriate by the Sentencing Commission, special scrutiny must be applied.

The Third Circuit in Kikumura I, supra, engaged in a thoughtful analysis of the inequities which result when trial courts arithmetically add adjustments and departures to arrive a a sentence whose departure from the base offense level is unreasonable, especially when new criminal conduct, proved at the lower sentencing standard, is utilized to arrive at the departures.[3]

That court reviewed sentencing jurisprudence, recognizing that the general principles function well "in run-of-the-mill cases" Id. at 1100, but noted that there are instances in which their application reaches a result which leads to in extreme results.

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3. In the instant case damage, though unintentional to government property supported a departure though was initially a charged offense. Endangerment of the public welfare appears to encompass threat of injury by battery, another uncharged criminal violation.

> In this extreme context, we believe, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations.

Kikumura I, supra, provides two possible analytical approaches which may be utilized by sentencing courts when faced by the problem of a sentence which is substantially greater than the guideline range. Society could limit:

> ...the concededly broad power of legislatures to define, and courts to consider, conduct that is or could be criminalized as an aggravating factor at sentencing. In effect, this approach would require that, for sentencing purposes, certain findings in certain circumstances be made pursuant to the entire panoply of procedural protections which apply at trial.

Id at 1101.

> The second approach would: ...ratchet up certain, though not necessarily all, of the procedural protections afforded a defendant at sentencing, so as more closely to resemble those afforded at trial. at trial.

The Third Circuit, citing to McMillan v. Pennsylvania 477 U.S. 79 (1986) held that when the magnitude of the departures "can fairly be characterized as 'a tail which wags the dog of the substantive offense,'" general principles of what is constitutionally mandated requires that the burden of proof be greater.

> For the reasons explained above, we hold that in such situations, the factfinding underlying that departure must be established at least by clear and convincing evidence.

Id.

Mr. Kramer wishes to address himself to the most egregious overreaching by the trial court and the Court of Appeals.[4].

B. DISRUPTION OF GOVERNMENT FUNCTION

The Court of Appeals concluded, without benefit of detailed analysis or of citation to case authority, that Section 5K2.7 of the United States Sentencing Guidelines justifying a departure based upon disruption of government function was applicable because Section 2P1.1 of United States Sentencing Guidelines did not consider disruption for the charged offenses, concluding that the disruption was "factually supported by the Record," United States v. Kramer, 943 F. 2d. 1543, 1550 (11th Cir. 1991).

Further, though the District Court did not explain how it arrived at a three level departure, the appellate court found "the departure reasonable." Id. That holding cited with approval the

4. Mr. Kramer objected to and continues to urge that each and every of the upward departures and adjustments was unjustified. The particular departures discussed below are illustrative of the unguided manner in which the sentencing court arrived at a sentence five times that of the appropriate guideline sentence.

analogy of this escape attempt to a prison riot which caused "a major disruption to the operation of an institution[.] Id., (Emphasis added). No single case was cited. No rationale for a holding diametrically opposed to holdings in two sister circuits was provided.

Both lower courts were incorrect in their finding that the cited "disruptions," a lockdown of the institution, a recount of the population, police investigation and medical treatment, were in fact "disruptions" rather than utilizations of government functions.

Inherent in the offense of escape is the fact that the officers running the institution would stop all day-to-day activities of the prison in order to ascertain the status of the escapee, would count those prisoners still incarcerated, and would require that the prisoners return to their assigned places to have this count effected in an orderly fashion. These were the steps taken by MCC officials subsequent to this attempted escape.

The very cited Commentary recognizes that certain offenses of necessity "disrupt" governmental function by their nature.

> Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such asbribery or obstruction of justice; in such cases interference with a governmental function is inherent in the of-

fense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

U.S.S.G. Section 5K2.7 p.s.

Here the government function is incarceration of prisoners. Escape is surely no more disruptive of the incarceration function than, for instance, bribery of a law enforcement officer or of a judge would be to the justice system, yet it is clear that 5K2.7 would not apply to those offenses. The offense of escape also possesses the element of disruption inherent in its nature, hence no departure should be permitted.

As further proof that disruption is routinely considered an included concept of the offense of escape, no case has been located where a sentencing court departed on this basis in an escape.

Further, Section 2P1.1 Commentaries (n.1) reflects that even death or bodily injury are considered within the base offense level for escape and that a departure may, but not necessarily will be warranted even for these serious consequences. If even resulting death is ordinarily considered a part of the base offense level, how can it be seriously argued that an extra lockdown, etc. was not also included by the Commission? Government employees performing their government duties cannot justify a departure for disruption of

government function.

The second grouping of facts relied upon by the Court of Appeals in upholding this departure was that local, state, and federal police officers, paramedics and their Medivac and firefighting equipment and personnel were present and working at the institution. The number of personnel who were present was solely determined by law enforcement, fire, and medical personnel themselves. In point of fact the quantum and type of response was determined solely by government officials, hence their actions cannot now be urged or found to be the basis for departure.

Additionally, the departure cannot be sustained because any "disruption," to comply with Section 5K2.7 must clearly demonstrate that it (1) be significant, (2) reflect the nature and extent of the disruption, and that it further (3) reflect the importance of the governmental function affected.

Both the Ninth and the Third Circuits have addressed whether utilization of government services may be equated with disruption of those services or functions. Both Circuits have answered similar questions with resounding negatives.

In United States v. Singleton, 917 F.2d 411 (9th Cir.

1990), the Ninth Circuit reversed the District Court's finding of a disruption where officers had sought and had recaptured on two separate occasions an escapee from the Oregon State Penitentiary, in spite of the fact that on one occasion when stopped, the defendant forced his way out of a truck, hit and injured an officer and ran into a nearby field:

> The flaw in the government's argument is that it assumes that it is not a normal function of a police department to search for criminals.

Id.

That court concluded that the police department was not required to do anything more than its function when it was called on to apprehend Singleton and the amount of resources dedicated to the job was a decision controlled entirely by the police department. The police were performing exactly as they were supposed to perform.

Here, also, the number of response personnel was a decision controlled solely by government officials and these men and women were performing their jobs not being disrupted in the performance of their jobs.

In United States v. Riviere, 924 F.2d 1289 (3rd Cir. 1991), the Third Circuit engaged in a very similar analysis and reached the

same conclusion. In Riviere five marshals were transporting a prisoner when he assaulted them. The trip was immediately terminated and rescheduled for a later time when again five marshals were assigned to this duty. Riviere had been rejected on a commercial flight because of his behavior and a private plane had to be chartered. The District Court departed, based on disruption of government function.

The Third Circuit analyzed the policy underlying departures in Section 5K2.7 pointing out that "unless the circumstances are unusual the guidelines will reflect the appropriate punishment," Id. at 307, and that under Section 5K2.0 where disruption of governmental functions is inherent in the offense, the disruption would have to be quite serious to warrant departure. Id.

Citing favorably to Singleton, supra, the Court said that the "amount of resources to devote to the job was a decision controlled entirely by the marshal's office." Id.

In the instant case, the government argued and the Panel accepted that the number and type of professionals called by government officials, the calling of whom was a decision entirely controlled by MCC officials, warranted a departure.

See, also, United States v. Asper, 753 F.Supp. 1289

(M.D. Penn 1990) "Furthermore, a departure for disruption of a governmental function cannot be premised solely on the inconvenience resulting from investigating a criminal offense or performing duties that are part of the mandate of a particular agency or branch of government. Thus, departure on this basis is not warranted." Id. (Emphasis added).

In the instant case no government function was disrupted, hence no departure was justified.

C. ENDANGERMENT OF THE PUBLIC WELFARE

There are rare instances in which the endangerment of the public welfare can be the basis for a departure from the appropriate sentence to be imposed: U.S.S.G. Section 5K2.14 so provides only if "national security, public health, or safety was significantly endangered." Should that be found, then the range can only be increased to "reflect the nature and circumstances of the offense."

It is significant indeed for a departure to be quantified at four levels though this was the quantum arrived at by the sentencing court without benefit of explanation, and affirmed by the Eleventh Circuit in the instant case for this "endangerment." This departure alone changed the petitioner's sentence from a range of seventy to

eighty-seven months' incarceration to the currently imposed one hundred twenty-five months.

A fair reading of the above-cited Commentary and other guidelines and cases construing them would lead one to believe that a departure would be justified for such activities as poisoning a municipal water supply, manufacturing large-scale destructive devices, providing weapons to our enemies in wartime, etc. To have this provision distorted to justify a departure for an unsuccessful escape plan utilizing a helicopter which crashed is unsupportable.

The lower courts apparently justified this departure because prisoners and employees were present at the institution, though there were no injuries except to the petitioner and to a co-defendant. This presumption that a possible injury to certain individuals could be equated to a danger to the community was first proposed in the presentence investigation report. The presentence investigation reporter in some way equated bodily injury to several people with a significant endangerment of the public welfare. His misreading of Section 5K2.14 led to his urging and the court's acceptance of a four level increase. Yet cases in which a departure for endangerment of public welfare were upheld virtually unani-

mously consider situations which endanger general public health or safety. The reporter did not acknowledge that departures under this section are warranted only where the danger posed is to a degree substantially in excess of that which is ordinarily involved and that utilization of this section should be rare. See, for instance, United States v. Uca, 864 F.2d 783 (3rd Cir. 1988).

A review of cases which have upheld the instant a departure support this position. See, for instance an instance wherein an individual was planning to bomb the occupied federal building in New York City, United States v. Kikumura, supra; where a defendant intended to poison Coca Cola products distributed nationwide, United States v. Hummer, 916 F.2d 186 (4th Cir. 1990) and where homemade pipe bombs and hand grenades were manufactured or possessed for utilization in a city. United States v. Loveday, 922 F.2d 1411 (9th Cir. 1991) and United States v. Dempsey, ____ F.2d ____ (11th Cir. April 8, 1992 No. 89-6046).

D. THE LOWER COURTS FAILED, AFTER QUANTIFYING INDIVIDUAL DEPARTURES, TO CONSIDER THE PROPRIETY OF THE TOTAL ADJUSTMENTS.

The instant situation is analogous to that in Kikumura I, supra. That court first decided that certain departures were appro-

priate, then it evaluated the totality of the departures against a standard of reasonableness, finding that in that case a five level adjustment for the merged adjustments of extreme conduct and endangerment to the public safety was warranted.

Here, the sentencing court mechanistically and arithmetically cumulated point after point until it more than doubled the base offense level and more than quintupled the sentence. It did not then balance the departures against the base offense level for reasonableness.

In Kikumura I the defendant planned to bomb the federal building in Manhattan by using an incendiary-type device that upon explosion would have sprayed shrapnel "with tremendous force in every direction." Id. at 1118. The sentencing court had departed based upon Section 5K2.8 of the Sentencing Guidelines for extreme conduct and further departed on the basis of Section 5K2.14 for endangerment of the public safety. The Third Circuit found that those two departures addressed "sufficiently distinct aspects of Kikumura's conduct to warrant upward departure." Kikumura I." It did not end its analysis at that point, however.

Acknowledging that the guidelines offered no guidance as to the quantum of departure appropriate under either 5K2.8 or

5K2.14, the court noted that all of the adjustments in Chapter 3 provided for increases between two and four levels. When merging the two departures it upheld the trial court's determination of a five level departure for the merged concept of extreme conduct and endangerment of public safety.

In the instant case the sentencing court dealt with each of the concepts of proposed adjustment separately and never entered into the final step analysis of whether the adjustments taken in their totality were reasonable. The departures for endangerment of public welfare and disruption of government function taken together increased the offense level by seven, a hardly reasonable result and one which would not have been reached had the lower courts engaged in this last step of analysis.

CONCLUSION

WHEREFORE, the Petitioner seeks to have this Honorable Court, issue its writ of certiorari to the United States Court of

Appeal for the Eleventh Circuit to review the issue raised herein.

Respectfully submitted,

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APPENDIX

U.S. v. KRAMER

UNITED STATES of America,

Plaintiff-Appellee,

v.

Marc KRAMER, August Zona, Charles Clayton Stevens,

Defendants-Appellants.

UNITED STATES of America,

Plaintiff-Appellee,

v.

James J. MARREN,

Defendant-Appellant.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Benjamin Barry KRAMER,

Defendant-Appellant.

Nos. 89-6229, 89-6240 and 90-5378.

United States Court of Appeals,
Eleventh Circuit
Oct. 11, 1991

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 89-345-CR-JWK, James W. Kehoe, J., of offenses arising out of an attempted prison escape, and they appealed. The Court of Appeals held that: (1) sufficient evidence supported upward departures for damage to government property, offense involving more than minimal planning, disruption of government function, and endangerment to public welfare; (2) consequences of escape attempt were reasonably foreseeable to conspiracy participants; (3) upward adjustments for leadership role in the offense and obstruction of justice were warranted; and (4) district court adequately adhered to required procedure for sentencing.

Affirmed and remanded.

1. Criminal Law 1252

An adjustment under the Sentencing Guidelines for acceptance of responsibility is not warranted when a defendant's conduct results in an enhancement for obstruction of justice. U.S.S.G. Section 3E1.1, comment. (n.4), 18 U.S.C.A.App.

2. Criminal Law 1139

Sufficient of the evidence is a question of law subject to de novo review by the Court of Appeals.

3. Criminal Law 1144.13(3,6), 1159.2(7)

In assessing the sufficiency of the evidence, the Court of Appeals must determine whether a reasonable trier of fact could find that the evidence, considered as a whole and in the light most favorable to the United States, established the defendant's guilt beyond a reasonable doubt.

4. Escape 10

Evidence was sufficient to support finding that letters defendant wrote to airplane pilot were related to prison escape attempt by aircraft and to establish defendant's guilt on escape charges related to escape attempt.

5. Criminal Law 1254

Sentencing court's application of one-level increase in base offense level for property loss greater than $100 and less than $1,000 was supported by record evidence clearly indicating that helicopter crash during prison escape attempt caused at least $100 in property damage. U.S.S.G. Sections 2B1.1(b)(1)(B), 2P1.1, 18 U.S.C.A.App.

6. Criminal Law 1251

Sentencing court's application of two-level increase in base level offense under guidelines provision authorizing enhancement for an offense involving more than minimal planning was supported by the record; attempt to free prisoner involved six-month conspiracy, five participants, a helicopter, an airplane fitted with extra fuel tanks, car with a secret compartment for hiding, a safehouse, coded messages, and hundreds of thousands of dollars. U.S.S.G. Section 1B1.1, comment. (n.1), 18 U.S.C.A.App.

7. Criminal Law 1240(2)

Offense of escape or instigating or assisting in escape did not itself adequately take into account the disruption of governmental function caused during attempt to effect helicopter escape of prisoner from federal prison, so as to preclude enhancement for disruption of governmental function. U.S.S.G. Sections 2P1.1, 2P1.1, 2P1.3, 5K2.7, p.s., 18 U.S.C.A.App.

8. Criminal Law 1254

Evidence supported sentencing court's increase in upward adjustment of defendant's base offense level for disruption of a governmental function; during attempted escape from federal prison, local, state and federal law enforcement personnel, paramedics,

medical care facility helicopter and fire fighters were called to scene of helicopter crash, and actions necessary to respond to helicopter crash inside prison grounds disrupted operation of facility beyond the level of disruption contemplated by ordinary escape attempt. U.S.S.G. Sections 2P1.1(a)(1), 2P1.3(a)(2), 18 U.S.C.A.App.

9. Criminal Law 1254

During prisoner escape attempt, flying helicopter into small, fenced, occupied prison exercise yard created a risk to public safety that provided a ground for upward adjustment for endangerment to public health; action was potentially dangerous for other inmates and prison officials in exercise yard as well as escaping prisoner and pilot. U.S.S.G. Sections 1B1.3, comment. (n.4), 2A2.2, 2B3.1, 2E2.1, 5K2.14, p.s., 18 U.S.C.A.App.

10. Criminal Law 1254

Risks of damager to government property, disruption of governmental function and endangerment of public welfare were reasonably foreseeable by defendants who participated in conspiracy to effect escape of federal prisoner, defendants knew that escape attempt involved aircraft and an entry into a federal prison, and although defendant's role was actively limited to introducing airplane pilot to codefendant, defendant knew the type of escape being planned and chose pilot because he was known as a daredevil. U.S.S.G. Sections 1B1.3(a)(1,3), 1B1.3, comment. (n.1), 18 U.S.C.A.Appl.

11. Criminal Law 1251

Four-level increase in base offense level for defendants based on their primary role in prison escape attempt by helicopter was supported by the evidence; although defendant claimed he was relatively minor participate who served only as his codefendant inmate brother's messenger, evidence supported finding that defendant supervised helicopter pilot's activities, provided him with necessary cash, engaged in frequent coded conversations with his brother, and directed escape operation from the outside. U.S.S.G. Section 3B1.1, comment. (n.3), 18 U.S.C.A.App.

12. Criminal Law 986.2(2)

A district court can consider reliable hearsay evidence at sentencing.

13. Criminal Law 1312

Sentencing court could consider reliable hearsay evidence in increasing defendant's offense level by two for obstruction of justice based on his alleged threats to codefendant in prison escape conspiracy; although codefendant did not testify at sentencing, defendant was given the opportunity to rebut statements of codefendant which were included in the presentence investigation report. U.S.S.G. Section 6A1.3, p.s., 18 U.S.C.A.App.

14. Criminal Law 1305

Sentencing Guidelines do not require a sentencing judge to believe a defendant whenever he chooses to testify. U.S.S.G. Section 3C1.1, comment. (n.2) (1990).

15. Criminal Law 1158(1)

District court's determination that defendant has obstructed justice is a factual finding which must be affirmed unless it is clearly erroneous.

16. Criminal Law 1321(2)

Procedure followed by district court in sentencing defendants involved in prison escape conspiracy satisfied guidelines requirements; district court's comments reflected its assessment of the type of escape attempted in the case and resulting consequences, court clearly analyzed extent of all departures and enhancements as well as the reasonableness of each, and articulated its reasons for each upward departure and applicable enhancements. Fed.Rules Cr.Proc.Rule 32(c)(3)(D), 18 U.S.C.A.

17. Criminal Law 1181.5(8)

District court's failure to append records of its findings on

challenged factual assertions contained in presentence investigation reports was a ministerial matter which could be remedied on remand without resentencing. Fed.Rules Cr.Proc.Rule 32(c)(3)(D), 18 U.S.C.A.

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT and DUBINA, Circuit Judges and CLARK, Senior Circuit Judge.

PER CURIAM:

Appellants, Benjamin Barry Kramer ("Ben Kramer"), Marc Kramer, James J. Marren ("Marren"), Charles Clayton Stevens ("Stevens"), and August Zona ("Zona"), appeal their sentences for attempting to effect Ben Kramer's escape from prison. Marren also appeals his conviction. For the reasons which follow, we affirm Marren's conviction and the appellants' sentences, but remand the case to the district court for disposition of certain ministerial matters.

I. FACTUAL BACKGROUND

Ben Kramer and Marren were incarcerated together in the Williamson County Jail in Marion, Illinois, awaiting trial on related drug trafficking charges. In October 1988, Ben Kramer was found guilty of conducting a continuing criminal enterprise and conspiracy to distribute more than 1,000 pounds of marijuana, for which he was sentenced to life imprisonment without parole. Following the conclusion of the proceedings in Illinois, Ben Kramer was scheduled to be transferred to prison in Florida to face charges of RICO

conspiracy, marijuana importation, and filing a false tax return.[4]

In late October 1988, Marren wrote two letters to Stevens, with whom Marren had worked prior to the events pertinent to this case. Marren asked Stevens to come to Illinois to see him in prison, advised Stevens that he should plan to go to Miami, Florida, after he visited Marren, requested that Stevens brings his pilot's license, informed Stevens that all of his expenses would be paid, and emphasized the importance of keeping their meeting a secret. After receiving Marren's letters, Stevens went to Illinois. During their visit, Marren pointed out Ben Kramer to Stevens as Kramer walked by. Marren also supplied Ben Kramer's brother, Marc, with a letter of introduction to Stevens.

Stevens met Marc Kramer in Illinois, and they then traveled together to Miami, where they began to plan Ben Kramer's escape from prison and transport to Columbia. While in Miami, Stevens took reconnaissance photographs of prisons where Ben Kramer was likely to be held awaiting trial, began looking for a helicopter, and began taking lessons to learn to fly a helicopter. All of his expenses were paid by Marc Kramer. Stevens eventually located and purchased a helicopter and a twin-engine airplane. The plane sustained wing damage during a routine maintenance operation, so he purchased a second plane. Stevens paid for the aircraft with approximately $135,000 in cash provided to him by Marc Kramer. Stevens continued to take flying lessons from the initial planning stages of the escape until the plan was put into effect. Marc and Ben Kramer maintained telephone contact during this time, often utilizing coded phrases in their conversations.

After Ben Kramer was tried and sentenced in Illinois, he was transported to Florida to face trial. He was held in E Unit at Metropolitan Correctional Center in Miami ("MCC").

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4. Ben Kramer was convicted of the charges against him in Florida, for which he received a forty-year sentence. He was also sentenced to five years in prison in a separate case for possession of a weapon by a convicted felon.

The plan developed by the appellants called for Ben Kramer to be lifted out of MCC by helicopter.[5] Stevens was to fly the helicopter to the prison and land in the exercise yard, where Ben Kramer would be waiting. Stevens was to then fly him to a nearby car containing a false compartment in which he would be hidden. Zona, an employee of a business owned by Ben Kramer, was scheduled to drive the car to a safe house Zona had rented in Crystal River, Florida. The twin-engine airplane, which had been fitted with extra fuel tanks, was located near the safe house. As the final part of the escape, Stevens was to fly Ben Kramer to Columbia.

On April 17, 1989, Ben Kramer spoke by telephone with Marc Kramer. Marc Kramer then telephoned Stevens and directed him to put the plan into action. Stevens flew the helicopter to MCC and landed in the E Unit exercise yard. Ben Kramer was able to get into the helicopter, but as it lifted off, the helicopter began to spin, its tail hit the concertina wire, and it catapulted over the fence, crashing in the prison grounds outside the exercise yard. Both Ben Kramer and Stevens suffered extensive injuries in the crash.

II. PROCEDURAL HISTORY

The appellants were indicted for conspiracy to effect the escape of an inmate in violation of 18 U.S.C. Section 371 (Count I). In addition, Ben Kramer was charged with attempting to escape from the custody of the Attorney General in violation of 18 U.S.C. Sections 751(a) and 2 Count 3). A superseding indictment also charged Ben Kramer with obtaining a helicopter to facilitate his escape from prison in violation of 18 U.S.C. Sections 1791(a)(2) and (2) Count 5), and the remaining four appellants with providing a helicopter to Ben Kramer in violation of 18 U.S.C. Sections 1791(a)(1) and 2 (Count 4).

Marc Kramer and Zona pled guilty to Counts 1, 3, and 4

5. The only possible place for a helicopter to land in MCC's E Unit was the exercise yard, which was approximately forty-seven feet wide and surrounded by a chain link fence topped with concertina wire.

and Counts 1 and 3, respectively, pursuant to written plea agreements. Stevens pled guilty to Counts 1 and 4 pursuant to a plea agreement in which he agreed to testify for the United States. Marren proceeded to trial and was convicted on Counts 1, 3, and 4. Thereafter, Ben Kramer pled guilty to Counts 1, 2, and 5.

The United States sought upward departures from the Sentencing Guidelines for all appellants except Zona.[6] Each appellant except Stevens filed objections to his Presentence Investigation Report ("PSI"). Marc Kramer, Marren, and Zona were sentenced together, but separate sentencing hearings were held for Stevens and Ben Kramer, each of whom adopted the testimony presented and arguments raised at the sentencing hearing of their co-conspirators.

The district court determined that the Base Offense Level for each appellant was 13. U.S.S.G. Section 2P1.1. It then announced the following upward departures applicable to all appellants:

+ 1 level for property damage. Testimony adduced by the government indicated damage to the MCC fence valued at $4,000-$6,000. The appellants presented testimony indicating that the damage was substantially less. The district court gave the appellants the benefit of the doubt and departed on the basis that the damage was less than $1,000.

+ 2 levels on the basis of more than minimal planning. The district court found that the appellants engaged in elaborate preparations for the escape attempt.

+ 3 levels for disruption of government function. The district court found that the attempted escape created an extensive disruption for MCC.

6. As part of Zona's plea agreement, the United States agreed not to seek upward departures.

+ 4 levels for endangering public welfare and safety. The district court found that the helicopter's landing in the E Unit significantly endangered several persons, including other inmates, in and around the area.

The district court also found that the factors on which it based its upward departures were not adequately taken into consideration by the Sentencing Commission, which did not contemplate a helicopter's flying into a correctional facility to extricate a prisoner.

[1] The district court made certain adjustments as to individual appellants, calculated a total offense level and criminal history category for each, and sentenced each appellant as follows:
Ben Kramer:

Base Offense Level: 13

+ 4 levels for his role as an organizer of an extensive criminal activity

- 2 levels for acceptance of responsibility

+10 levels applied to all appellants

Total Offense Level: 25
Criminal History Category V

Sentence imposed: 60 months each on Counts 1 and 2, plus 5 months on Count 5, to be served consecutively to the extent necessary to produce a total period of incarceration of 125 months. This prison term was also consecutive to the other sentences he was already serving. In addition, the court imposed 3 years supervised release, a fine of $100,000, and a $150 special assessment.
Marc Kramer:

Base Offense Level: 13

+ 4 levels for his role as an organizer of an extensive criminal activity

+ 2 levels for obstruction of justice[7]

+10 levels applied to all appellants

Total Offense Level 29
Criminal History Category I

Sentence Imposed: 45 months each on Counts 1 and 4 to be served consecutively, plus 3 years supervised release and a $100 special assessment. Count 3 was dismissed.[8]

Marren:

Base Offense Level: 13

- 2 levels for his minor role in the offense

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7. The district court found that Marc Kramer had accepted responsibility for his crime, but denied a downward adjustment on that basis because it also found that Marc Kramer had threatened Stevens and thereby had obstructed justice. An adjustment under the guidelines for acceptance of responsibility is not warranted when a defendant's conduct results in an enhancement for obstruction of justice. U.S.S.G. Section 3E1.1, Application Note 4.

8. One of the issues raised by Marc Kramer on appeal is that the district court dismissed the wrong count. The United States agrees that the dismissal of Count 3 was error, and that Count 4 should have been dismissed instead.

+ 2 levels for obstruction of justice[9]

+10 levels applied to all appellants

Total Offense Level: 23
Criminal History Category IV

Sentence imposed: 24 months each on Counts 1, 3, and 4 to be served consecutively, plus 3 years supervised release and a $150 special assessment.

Stevens:

Base Offense Level: 13

+ 2 levels for his major role in the offense

- 2 levels for acceptance of responsibility

+10 levels applied to all appellants

Total Offense Level: 23
Criminal History Category I

Sentence imposed: 30 months each on Counts 1 and 4 to be served concurrently, plus 3 years supervised release and a $100 special assessment.

9. The district court found that Marren had obstructed justice because his testimony at trial had been false or misleading and he had tried to bribe Stevens.

Zona:

Base Offense Level: 13

- 2 levels for acceptance of responsibility

+10 levels applied to all appellants

Total Offense Level: 21
Criminal History Category I

Sentence imposed: 19 months each on Counts 1 and 3 to be served consecutively, plus 3 years supervised release and a $100 special assessment.

III. MARREN'S CONVICTION

[2,3] Marren contends that the evidence presented at trial was insufficient to support his conviction. Sufficiency of the evidence is a question of law subject to de novo review by this court. United States v. Christopher, 923 F.2d 1545, 1553 (11th Cir.1991). In assessing the sufficiency of the evidence, this court must determine whether a reasonable trier of fact could find that the evidence, considered as a whole and in the light most favorable to the United States, established the defendant's guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); United States v. Sanchez, 722 F.2d 1501, 1505 (11th Cir.), cert. denied, 467 U.S. 1208, 104 S.Ct.2396, 81 L.Ed.2d 353 (1984).

[4] We have reviewed the record in this case and find that the evidence presented at Marren's trial was clearly sufficient to establish his guilt. Marren's testimony regarding his interpretation of the letters he wrote and the reason he sent for Stevens was implausible, and it was not unreasonable for the jury to reject it. We decline, therefore, to disturb the verdict of the jury.

IV. APPLICATION OF THE UNITED STATES SENTENCING GUIDELINES

Appellate review of departure cases consists of the following three steps:

> First, we will determine whether the guidelines adequately consider a particular factor so as to preclude a district court from relying upon it as a basis for departure. We exercise de novo review of this question of law. Second, we must determine whether there exists sufficient factual support for the departure. This review implicates the district court's fact-finding role and we are constrained from reversing its findings except for clear error.... Finally, "once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal, be measured a standard of reasonableness." In this vein, we must be mindful of "the factors to be considered in imposing a sentence...and evaluate these in light of "the reasons for the imposition of the particular sentence as stated by the district court[.]" [Appellate courts are also required] to "give due regard to the opportunity of the district court to judge the credibility of the witnesses ... and [to] give due deference to the district court's application of the guidelines to the facts."

United States v. Weaver, 920 F.2d 1570, 1573 (11th Cir.1991) (citations and footnotes omitted).

A. Departures applicable to all appellants

We begin our review of the appellants' sentences with the district court's departures applicable to all appellants.[10] The district court's decision to depart upward a total of ten levels for each appellant resulted in sentences of approximately three times the guideline range for all appellants except Stevens. Due to Stevens'

10. The district court explained its decision to depart upward in this case in terms of adjustments to the appellants' base offense levels for each departure.

cooperation with the United States, his sentence was approximately two times the guideline range. All of the appellants assert that the district court's departures for property damage, extensive planning, disruption of a governmental function, and risk of injury were erroneous. They argue that all are inherent in an escape attempt, and that the base offense level must have taken these factors into consideration. We find no merit to the appellants' arguments.

1. Damage to government property

[5] U.S.S.G. Section 5K2.5 states as follows: If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

U.S.S.G. Section 2P.1.1, which provides the base offense level applicable to an escape or attempted escape from prison, does not take damage to a prison facility into consideration. Pursuant to U.S.S.G.
Section 2B1.1(b)(1)(B), which provides for a one-level increase for property loss greater than $100 and less than $1,000, the district court departed upward one level for the property damage caused by the crash. The record clearly indicates that the escape attempt caused at least $100 in property damage. Accordingly, we find this departure reasonable.

2. More than minimal planning

[6] More than minimal planning is defined as "more planning than is typical for commission of the offense in a simple form." U.S.S.G. Sectional 1B1.1, Application Note 1(f). More than minimal planning also exists "if significant affirmative steps were taken to conceal the offense." Id. The attempt to free Ben Kramer involved a six-month conspiracy, five participants, a helicopter, an airplane fitted with extra fuel tanks, a car with a secret compartment for hiding, a safe house, coded messages, and hundred of thousands of dollars. We are persuaded that the planning

involved this escape attempt via helicopter from the prison recreation yard was well beyond the contemplation of the Sentencing Commission, and that there is ample factual support in the record evidencing the extensive planning which this undertaking required. Thus, application of the two-level increase was reasonable under the circumstances. Throughout the guidelines, if more than minimal planning is considered a specific offense characteristic, a two-level upward adjustment is recommended. See, e.g., U.S.S.G. Sections 2A2,2(b)(1), 2B2.2(b)(1), 2F1.1(b)(2).

3. Disruption of governmental function

U.S.S.G. Section 5K2.7 states:

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected.

[7,8] U.S.S.G. Section 2P1.1 does not consider any adjustment for the disruption of a governmental function. In contrast, Section 2P1.3 provides a base offense level of 16 for engaging in, inciting, or attempting to incite a prison riot if the offense involved a major disruption to the operation of an institution. We find, therefore, that the offense of escape or instigating or assisting an escape does not adequately take into account disruption of a governmental function. We further find that such disruption in the present case is factually supported by the record. The appellants attempt to minimize the disruption to the operation of MCC, citing only a delayed airlift of prisoners, a lockdown of the facility, and an extra count of prisoners. We agree with the United States that governmental response to this escape attempt involved much more. Present at the crash scene were local, state, and federal law enforcement personnel, paramedics, a Dade County Medivac helicopter, and firefighting equipment and personnel. The actions necessary to respond to the crash of a helicopter inside the prison grounds with an escaping prisoner on board disrupted the operation of MCC far beyond the level of disruption contemplated by a run-of-the-mill escape at-

tempt. The district court based its three-level departure on the difference between the base level of 13 provided by U.S.S.G. Section 2P1.1(a)(1) and that of 16 provided by Section 2P1.3(a)(2). We find the departure reasonable.

4. Endangerment to public welfare

U.S.S.G. Section 5K2.14 states:

If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense.

[9] The appellants argue, in essence, that since they hurt no one but themselves, the district court erred in departing on this basis. They rely on a portion of U.S.S.G. Section 1B1.3, Application Note 4, which states that [u]nless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred." The next sentence of Application Note 4 indicates, however, that actual danger is not required. "When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range." Id. We find that flying a helicopter into a small, fenced, occupied prison exercise yard created a risk that provides a ground for upward departure in this case. Such a stunt was potentially dangerous not only for Ben Kramer and Stevens, for whom the risk of harm became a reality, but also for the other inmates and prison officials in the exercise yard. The record reflects the hazards posed by this escape attempt. Even though fortuitous circumstances allowed all but the perpetrators to escape potential injury or death, we see no reason to allow the appellants to be rewarded for the creation of the risk to the remaining occupants of MCC. The guidelines provide, as specific offense characteristics for a number of crimes against a person, a two-level increase for bodily injury, a four-level increase for serious bodily injury, and a six-level increase for permanent or life-threatening bodily injury. See, e.g., U.S.S.G. Sections 2A2.2, 2B3.1, 2E2.1. Since life-threatening bodily injury was a possibility in this case, we find the district court's four-level departure on the basis of the risk of serious bodily injury to be reasonable.

5. Reasonable foreseeability

[10] The appellants argue that the foregoing ten-level departures were erroneous because the consequences of the escape attempt were not reasonably foreseeable. Marren places added emphasis on this argument because of his limited involvement in the conspiracy.

U.S.S.G. Section 1B1.3, Application Note 1, states:

In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

In determining relevant conduct, U.S.S.G. Sections 1B1.3(a)(1) and (3) state that the district court should consider:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

* * * * *

(3) all harm that resulted from the acts or omissions specified in subsection [] (a)(1) ... above ....

The appellants knew that the escape attempt involved aircraft and entry into a federal prison. Common sense indicates that such an operation has the potential for significant risks. Even though Marren's role was actively limited to introducing Stevens to Marc Kramer, Marren knew the type of escape being planned, for he chose Stevens not only because he had a pilot's license, but because he was known as a daredevil. We find that not only the crash, but also the resulting property damage, disruption of governmental functions, and endangerment of the public welfare, were

reasonably foreseeable as to all appellants.

B. Adjustment applicable to individual appellants

We now turn to the adjustments made by the district court which are applicable to individual appellants.

1. Leadership role in the offense

[11] The Kramer brothers both received a four-level increase based upon their primary roles in the offense. U.S.S.G. Section 3B1.1 states:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

The guidelines also provide that there can be more than one person who qualifies as a leader or organizer of a criminal conspiracy. U.S.S.G Section 3B1.1, Application Note 3.

The district court's determination of a defendant's role in the offense is reviewed under the clearly erroneous standard. United States v. Sellers, 906 F.2d 597, 605 (11th Cir.1990).

Marc Kramer argues that the district court erred in evaluating his role in the offense. He claims that he was a relatively minor participant who served only as his brother's messenger. The United States contends that Marc Kramer supervised Stevens' activ-

ities, provided him with all necessary cash, engaged in frequent coded telephone conversations with his brother, and directed the escape operation from the outside. Both Kramers argue that, at least, the district court should have departed only two levels instead of four.

We cannot say that the district court's factual findings regarding the roles played by the Kramer brothers in this offense are clearly erroneous, and therefore, will not disturb the district court's decision to apply a four-level increase on this basis.[11]

2. Obstruction of justice

In Marc Kramer's PSI, the probation officer included allegations from Stevens that Marc Kramer threatened Stevens and his family early in the planning stages for the escape if Stevens failed to carry through, and again when both men were in prison awaiting trial for this offense. Marc Kramer denied the allegations at the sentencing hearing. Stevens did not testify. At the hearing, the district court stated its belief that Marc Kramer had made the threats against Stevens, notwithstanding the fact that Stevens did not testify at sentencing,[12] and increased Marc Kramer's offense level by two for obstruction of justice. Marc Kramer argues that the district court's reliance on Stevens' hearsay statements in the PSI without requiring proof of the allegations at the sentencing hearing was error, relying on United States v. Christopher, 923 F.2d at 1556-57. In Christopher, however, the district court sentenced the defendant without making factual findings as to the factual questions that Christopher disputed. In the present case, Marc Kramer was given the opportunity to rebut the statements made by Stevens which were included in the PSI, but the district

11. The Kramers also argue that the district court's assignment of a four-level increase for their roles in the offense is duplicative of its departure for more than minimal planning. We see no merit to that argument.

12. We note that the district court had an opportunity to evaluate Stevens' credibility as a witness when he testified at Marren's trial.

court resolved the disputed factual issues against Kramer.

[12,13] Case law from this circuit clearly permits a district court to consider reliable hearsay evidence at sentencing. United States v. Query, 928 F.2d 383, 384-85 (11th Cir.1991) (findings of fact made by the district court in reliance on hearsay statements contained in a co-conspirator's PSI not erroneous). See also United States v. Castellanos, 904 F.2d 1490, 1496 (11th Cir.1990) (hearsay statements may be considered at sentencing so long as the defendant has "the opportunity to rebut the evidence or generally to cast doubt upon its reliability"); United States v. Murillo, 902 F.2d 1169, 1172 (5th Cir.1990) (upward departure may be justified "solely on the basis of information contained in a presentence investigation report"). Furthermore, U.S.S.G. Section 6A1.3 provides that a sentencing court may rely on "relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

[14] Marc Kramer also relies on U.S.S.G. Section 3C1.1, Application Note 2, which states that "suspect testimony and statements should be evaluated in a light most favorable to the defendant." The Fifth Circuit has held, however, that the guidelines do not require the sentencing judge to believe a defendant whenever he chooses to testify. In United States v. Franco-Torres, 869 F.2d 797 (5th Cir.1989), the defendant's word that he did not shoot at an agent was pitted against the agent's word that he did shoot. The sentencing judge chose to credit the agent's testimony, and the Fifth Circuit affirmed. 869 F.2d at 800-01. We agree with the Fifth Circuit that to construe Application Note 2 to require the sentencing judge to credit a defendant's testimony "would effectively enable every defendant to nullify its application by self-serving testimony." 869 F.2d at 801. Application Note 2 simply instructs the district court, after weighing the evidence, to resolve in favor of the defendant those conflicted issues about which the district court has not reached a definite conclusion. Id.

[15] The district court's determination that a defendant has obstructed justice is a factual finding which must be affirmed unless it is clearly erroneous. United States v. Cain, 881 F.2d 980, 982 (11th Cir.1989) (per curium). After weighing the evidence, the

district court determined that it believed that Marc Kramer had made the threats against Stevens. We cannot say that the district court's finding that Marc Kramer obstructed justice was clearly erroneous. In fact, we agree with the district court that the enhancement of Marc Kramer's base offense level on that basis was warranted.

C. Adherence to procedure

[16] The appellants contend that the district court erred because it did not engage in a step-by-step analysis of the extent of the departures, evaluate the reasonableness of the departures, articulate reasons for the departures, or resolve factual disputes. Our review of the record indicates otherwise.

The district court's comments reflect its assessment of the type of escape attempted in this case and the resulting consequences of the attempt. It is clear that the district court analyzed the extent of all departures and enhancements, as well as the reasonableness of each. Pursuant to 18 U.S.C. Section 3553(c), the district court articulated its reasons for departing upward on each of the four departure grounds applicable to all appellants and on those enhancements applicable to certain individual appellants. The district court also resolved the factual disputes underlying the departures and enhancements as required by Fed.R.Crim.P. 32(c)(3)(D), finding in favor of the appellants on the issue of property damage and against them on all other disputed issues. We find no reversible error in the procedure followed by the district court in sentencing the appellants.

[17] The appellants also argue that the district court did not resolve all of the disputed facts or states that it was not relying on the disputed facts in sentencing. The record indicates the district court's resolution of factual disputes was adequate. Rule 32(c)(3)(D) requires that "when a defendant challenges a factual assertion in a PSI, the court must either make a finding as to the allegation or determine that no such finding is necessary because the matter controverted will not be taken into account in sentencing." United States v. Lopez, 907 F.2d 1096, 1101 (11th Cir.1990). In either event, a "written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the

Bureau of Prisons...." Rule 32(c)(3)(D). The United States acknowledges that the district court's findings of record have not yet been made a part of the PSIs pursuant to Rule 32(c)(3)(D). The failure of the district court to append a written record of its findings is a ministerial matter, however, which can be remedied on remand without resentencing. Lopez, 907 F.2d at 1101 n. 7. On remand, the district court can rectify its error by attaching a copy of the relevant sentencing hearing transcript pages to each appellant's PSI.

D. Dismissal of incorrect count

Marc Kramer's plea agreement called for the dismissal of Count 4 if Ben Kramer pled guilty to the charges against him. At sentencing, the district court dismissed Count 3. On remand, the district court is directed to correct Marc Kramer's Judgment and Commitment Order to reflect his plea of guilty to Count 3 and the dismissal of Count 4.

E. Other sentencing issues

All appellants but Stevens objected to the consecutive sentences imposed by the district court. The Kramers also argue that the district court improperly denied their request for Brady[13] material at sentencing, and Ben Kramer contested the imposition of a stand-committed fine. We see no merit to any of these issues, and see no need to address them.

V. CONCLUSION

For the foregoing reasons, we affirm Marren's conviction and the sentences imposed upon all of the appellants. The case is remanded to the district court for the purpose of attaching a writing to each appellant's PSI in compliance with Fed.R.Crim.P. 32(c)(3)(D) and for correcting Marc Kramer's Judgment and Commitment Order.

AFFIRMED and REMANDED with directions.

13. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No: 89-6229

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARC KRAMER,
AUGUST ZONA,
CHARLES CLAYTON STEVENS,

Defendants-Appellants.

No: 89-6240

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES J. MARREN,
Defendant-Appellant.

No: 90-5378

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

BENJAMIN BARRY KRAMER,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and DUBINA, Circuit Judges, and CLARK, Senior
Circuit Judge.

PER CURIUM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)